IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 202.

BURNHAM CHEMICAL COMPANY, A Corporation, *Petitioner*

v.

OSCAR L. CHAPMAN, Secretary of the Interior, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITIONER'S REPLY BRIEF.

I.

Petitioner Did Appeal the Rejection of Its Permit Application.

Respondents state (a) that petitioner's application for prospecting permit was finally rejected February 9, 1929 (br. p. 5); (b) that because petitioner did not appeal the notice of rejection, it failed to exhaust its administrative remedy with respect thereto (br. p. 8); (c) that the subsequent contest proceeding with the Borax Company did not involve a reconsideration or redetermination with respect to petitioner's permit application (br. p. 9); and (d) that petitioner's contention that it did appeal the

rejection of its permit application as a part of its contest appeal is without substance (br. pp. 8-9).

Inasmuch as the foregoing contention formed the ground for defendant Chapman's final rejection of petitioner's application for reinstatement of its prospecting permit application in 1947 (R 110-111), and inasmuch as the trial court in the present proceeding also adopted this view (R. 116), petitioner respectfully calls attention to the following facts:

(1) The letter of the Commissioner of the General Land Office, dated November 23, 1928, ordered a contest proceeding between petitioner on its "application 045676 for a sodium prospecting permit" (R. 228, 231) and United States Borax Company on its mineral application.

This was more than seven weeks before petitioner's lease application was filed (R. 96). Obviously, the contest involved the *permit* application.

(2) The Register's decision on the contest, which decision was dated February 12, 1931, begins with these words (R. 99):

> "Burnham Chemical Co. v. United States Borax Co. * * *, United States Intervenor.
>
> "Involving sodium prospecting permit 045676, sodium lease application 046681 * * *"

045676 was petitioner's prospecting permit application. 046681 was petitioner's lease application. Obviously, the contest involved the *permit* application.

(3) The Commissioner's decision dated April 21, 1932 (R. 206), lists petitioner's permit application 045676 and its lease application 046681. The first words of the decision are: "Reference is made to sodium prospecting permit application 045676 * * *."

The opinion states (R. 215) "045676 is held for rejection subject to contestant's right to appeal to the Secretary of

the Interior within 30 days from notice." 045676 was petitioner's *permit* application.

(4) The Secretary, on appeal decided March 8, 1933, stated " * * * the register * * * recommended rejection of the *applications* of the Burnham Chemical Company"; also "The Commissioner accordingly affirmed the register's decision and held the *permit* application of the Burnham Chemical Company for rejection, from which holding Burnham Chemical Company has appealed." 54 I. D. 183, 185 (italics added). The Secretary thus admitted that the appeal involved the *permit* application and he affirmed the Commissioner's decision.

(5) In 1935 the Solicitor of the Interior Department stated that Burnham Chemical Company had filed an application for sodium prospecting permit on Little Placer and had been allowed to prosecute proceedings before the local register with respect thereto (R. 217).

(6) Petitioner's continuous efforts, subsequent to 1935, to obtain reinstatement of its applications are set forth at page 9 of its Petition for Certiorari.

It is evident from the foregoing not only that petitioner did appeal the rejection of its permit application and did exhaust its administrative remedy with respect thereto, but also that the Register, Commissioner and Secretary recognized the contest proceeding as involving the permit application. Is it not equally evident that both respondent Chapman and the trial court erred in holding that petitioner failed to exhaust its administrative remedy?

II.

Petitioner Did Not Concede That Little Placer Was Known to Contain Sodium Borates.

Respondents contend that by filing its application for lease, petitioner conceded that the land contained sodium borates, and therefore, was not subject to prospecting permit (br. p. 9).

In filing its application for lease, petitioner merely adopted an alternative procedure based upon the statement in the Commissioner's letter of November 23, 1928, that Little Placer was known to contain sodium borates (R. 229). Petitioner never conceded that Little Placer was known to contain sodium borates. Its contest proceeding was prosecuted in the alternative, and respondents and their predecessors in office recognized such to be the fact. This is demonstrated by petitioner's continuous prosecution of both its permit application and its lease application in the contest proceeding, and respondents' predecessors' recognition thereof as set forth in paragraph I hereof.

III.

The Permit Application Rejection Was Not Premised Upon the Geological Survey Report.

Respondents contend that the original rejection of petitioner's permit application, being based upon a Geological Survey Classification, was neither arbitrary or capricious, and therefore, cannot be set aside (br. p. 8). The Geological Survey had reported in October 1928 that "The records of the Geological Survey indicate that the lands listed in Section 24 * * * contain sodium salts in commercial quantities and are subject to entry only under lease" (R. 205). The Commissioner in turn stated that the lands "contain sodium salts" and are subject to entry only under lease (R. 229).

Had the report been accepted and a lease been granted pursuant to the regulations, the Commissioner's action undoubtedly would have been neither arbitrary nor capricious, *prima facie*. But he did not rely upon the report and lease the lands. Instead he ordered a contest proceeding to determine the very fact reported by the Geological Survey. After hearing, the Register held, contrary to the Geological Survey report "that borate of sodium had not been discovered, nor could it reasonably be presumed to exist upon" Little Placer (*Burnham Chemical Co.* v. *U. S. Borax Co.*, 54 I. D. 183 at p. 185), and that Little Placer

was not subject either to prospecting permit or to lease. The Commissioner and Secretary both affirmed on appeal. Subsequently, the Secretary reopened the proceeding as to the Borax Company. He determined, solely by geological inference, that Little Placer was known to contain sodium borates; he held the Borax Company location to be void ab initio; and he ousted that claimant. But he refused to reopen the proceeding as to petitioner or to reinstate its applications. Neither respondents' action, nor that of respondents' predecessors, was based upon the report of the Geological Survey but was based solely upon the evidence adduced in the original contest proceeding and in the reopened proceeding.

IV.

If the Doctrine of Geological Inference Is Not Applicable, Petitioner Is Entitled to a Permit; If It Is Applicable, Petitioner Is Entitled to a Lease.

(1) Petitioner filed its prospecting permit application June 1, 1928. There was at that time no other lawful claimant to Little Placer. Unless Little Placer was then known to contain sodium borates "dissolved in and soluble in water, and accumulated by concentration," petitioner was entitled, as of right, to a prospecting permit under Section 23 of the Leasing Act. Although a drilling 907 feet deep had been made on Little Placer, no sodium borates had been discovered thereon. That was 100 feet deeper that any known deposit. Unless the doctrine of geological inference is applicable, Little Placer was not known to contain sodium borates of any kind (R. 34, 58), and petitioner is entitled to a prospecting permit.

(2) Whether the doctrine of geological inference is applicable is an important question in this case. The doctrine has been applied by this Court in relation to oil lands, coal deposits, and other minerals, concerning which geological knowledge and information as to their nature, occurrence and manner of deposition was well known

(R. 34). But in 1928 the geological knowledge and information with respect to tincal and kernite (the sodium borates herein involved) was embryonic. The manner of deposition was unknown and they had been found only in lenses, disconnected and irregular, and without surface indication (R. 102).

(3) On the other hand, if the doctrine of geological inference is applicable, Little Placer was subject to lease. Being the only lawful claimant in January 1929 (except McMillan who neither offered evidence in nor appealed the contest proceeding), petitioner was, and is, entitled to consideration of its lease application under the regulations, promulgated pursuant to specific statutory authorization, then in effect (R. 95). Petitioner has never received that consideration.

CONCLUSION.

Petitioner submits that (1) if the doctrine of geological inference is not applicable, the action of respondents and their predecessors in office, in refusing to grant a sodium prospecting permit was and is arbitrary and capricious; and (2) if that doctrine is applicable, the action of respondents and their predecessors in office in failing and refusing to consider petitioner's lease application under the statute and regulations in effect at the time of the filing thereof was and is arbitrary and capricious.

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